Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	WT Docket No. 13-238
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	WC Docket No. 11-59
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	RM-11688 (terminated)
2012 Biennial Review of Telecommunications Regulations	WT Docket No. 13-32

CITY OF DES MOINES, IOWA RESPONSE TO NOTICE OF PROPOSED RULEMAKING, FCC13-122, ADOPTED AND RELEASED SEPTEMBER 26, 2013 IN THE ABOVE-CAPTIONED MATTER

The City of Des Moines, Iowa ("Des Moines" or "City"), by and through the undersigned, its City Engineer, hereby submits the following comments and response to the Notice of Proposed Rulemaking, FCC 13-122, released by the Federal Communications Commission ("Commission") regarding Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, as addressed in the above-captioned matter. Specifically, Des Moines is responding to the FCC request for comment relating to rules and interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act")[1] from a proprietary perspective.

As duly noted by the Intergovernmental Advisory Committee, a stated purpose of the Commission's Notice of Proposed Rulemaking is to enforce federal regulatory processes in a manner "consistent with local community needs, interests and values", while simultaneously looking to eliminate steps that would delay wireless infrastructure deployment.[2] Des Moines' position is that proprietary rights to property, structures and improvements owned by the City and funded by local residents are neither steps that delay such deployment nor steps that can be overlooked or erased regardless of delay.

Des Moines recommends against the Commission treating access to local governmental

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012)(codified at 47 U.S.C. § 1455(a)).

[2] Intergovernmental Advisory Committee (IAC) to the Federal Communications Commission, Advisory Recommendation No. 2013-13, pp. 1-2 (citing *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, et al.,* Notice of Proposed Rulemaking, FCC 13-122, WT Dkt. No. 13-238, WC Dkt. No. 11-59, RM-11688 (terminated), WT Dkt. 13-32 (rel. Sept. 26, 2013)("NPRM"), at para. 3.

buildings, public improvements, and fixtures in the same manner as access to utility poles[3], as possible if the Commission adopts broad definitions of "existing wireless tower or base station" or of "eligible facilities request"[4] to interpret the Spectrum Act. City facilities should not be available for automatic, non-negotiable and undeniable access for any entity or use, including for wireless deployment. In contrast, cities as property owners[5] should be placed on equal footing with private property owners who may regulate whether or not they are willing to allow wireless equipment to be placed on their private buildings and structures.[6] The City, in its role as property owner, may wish to disallow wireless structures from certain real property and improvements for various reasons including planned development, safety concerns and cost.

I. Proprietary Interest in Review of Requests under Section 6409(a) of the Spectrum Act. Des Moines agrees with the Commission's proposal "to find that the requirement that States and localities 'may not deny and shall approve' covered requests in any case… does not apply to such entities acting in their capacities as property owners." [7] As noted by the IAC:

> Section 6409(a) cannot reasonably be construed to be applicable to actions of state, local and tribal governments acting in a proprietary capacity, to restrain proprietary decisions as to how public property can or should be used and the terms and conditions of such use. Congress and the Commission have not attempted to mandate that proprietary rights give way to forced occupancy by wireless facilities either with respect to private or public property.[8]

In order to "ensure it is clear in which capacity governmental action is requested and in which capacity a governmental entity is acting"[9] – i.e., either proprietary or regulatory – a simple determination that a State, local government, or local utility owns or is in control of a property, structure or right-of-way could be used to demonstrate the proprietary nature of the action.[10]

In addition, the Commission should not adopt or implement any recommendation that "an existing wireless tower or base station" is to be interpreted as any pre-existing City-owned structure, improvement or real property that potentially could be used for placement of a wireless tower or base station, whether or not such structure is currently used for wireless equipment and to provide wireless services or collocation. If such interpretation were adopted, the City would appear to be required to allow collocation or placement of wireless equipment, such as small cell or distributed antenna system ("DAS") technology[11], on any of its facilities or improvements including but not limited to "short structures" or on

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[3] NPRM, at para. 4 ("In 2011, the Commission adopted an order that ensures timely and rationally priced access to utility poles ("*Pole Attachment Order*")").

[4] NPRM at para.9.

[5] The use of the term "landlord" to reflect a county is used by the Commission, NPRM at para. 129, to quote an IAC recommendation. Des Moines acknowledges that its use of the term "owner" is as owner in trust for its residents.

[6] See, e.g., IAC Recommendation No. 2013-13, p. 7, stating "[t]he Commission also asks…..whether Section 6409(a) would 'impose no limits' on a government landlord's ability to refuse or delay action on a collocation request. The IAC recommends that the proper response…..is that indeed Section 6409(a) imposes no such limits and does not empower the Commission to impose such limits, any more than it limits or authorizes the Commission to impose limits on a private landlord's decision to refuse or delay action on a collocation request affecting the private landlord's property."

[7] NPRM at para. 124; see also NPRM at para. 129.

[8] IAC Recommendation No. 2013-13, p. 7

[9] NPRM at para. 129.

[10] Des Moines also supports the IAC recommendation found at page 7of Advisory Recommendation Number 2013-13, as follows: "The IAC recommends that the line can be drawn relatively easily by a principle that provides that if the entity that lawfully controls the proprietary authority regarding who may occupy a parcel of land and on what terms is a private, non-governmental entity, then any government restrictions on such occupancy would be treated as regulatory for this purpose, otherwise the government itself would be exercising propriety authority and federal law limits on the scope of regulatory authority would be inapplicable."

[11] Herein collectively, "small cell technology".

rooftops[12], without the opportunity to deny the "facilities requests" even when such requests are inappropriate due to the City's existing or planned usage of the facilities or improvements, in conflict with accessibility or safety standards, and even when denial would be to the mutual benefit of the wireless provider. For instance, the City as owner of a parking garage may need to deny a wireless provider's request to install equipment to service small cell technology because the parking garage is being sold for redevelopment; or the City as owner of right-of-way may need to deny a wireless provider's application to install fiber equipment underground because the corridor is already occupied by a sanitary sewer or by a different non-City utility. Such denials would benefit both the City as well as the wireless provider, or may be required by federal ADA or safety regulations. Specific examples include:

- Des Moines has been explicitly asked to inform a wireless provider regarding planned development or redevelopment of certain improvements in order for the provider to avoid installing equipment within such structures. Both the City and the wireless provider have saved cost and time by determining in advance that a specific location is not appropriate for wireless infrastructure deployment due to the planned redevelopment of the structure. The wireless provider is able to plan around the City's anticipated redevelopment of City property and avoid the cost of installing the wireless infrastructure when such equipment would have to be removed or redesigned with the sale of the property or demolition of the structure in the near, or even immediate, future. The City benefits by retaining the right to sell undeveloped property or demolish and redevelop old infrastructure improvements for the benefit of the local property tax base, creation of local jobs, and to provide services or facilities to be used by City residents.
- Des Moines has also requested that deployment of small cell technology on traffic signals be avoided. Traffic signal design and safety measures are regulated by State Department of Transportation and Manual on Uniform Traffic Control Devices (Federal Highway Administration, or FHWA) requirements as well as local standards, due to the nature and risk associated with such equipment. City staff determined such deployment to pose risks to public safety that outweighed any benefit to the residents or the wireless provider of such deployment, including but not limited to: (1) allowing third party wiring and equipment within traffic signal poles and equipment boxes creates the potential for wireless equipment and/or maintenance to cause failure to the traffic signal equipment, resulting in signal malfunctions or dark traffic signals causing vehicular and pedestrian risk; (2) signal pole loading and warranty issues could be created depending on the placement and type of equipment added to the pole, and the City could be prevented from adding its own equipment to the traffic signal pole if the loading is maximized due to the wireless equipment; (3) the wireless collocation limits the City's ability to upgrade, remove, and/or replace traffic control equipment without coordination or approval of the third party, causing difficulty during accidents, weather events, etc.; and (4) the City would have to devote staff resources and money for inspection of new installations and observation during maintenance operations of third party equipment, and due to limited staff resources, the City would not likely be able to respond as quickly as preferred by wireless providers.
- Des Moines, in order to comply with the Americans with Disabilities Act (ADA) as amended and regulations thereto[13], has denied, and needs the future right to either deny or regulate, placement of wireless equipment in certain areas on a structure due to accessibility and safety issues. In the City's discussions regarding small cell deployment with a wireless provider, it was suggested that cabinets of medium diameter would be

[12] NPRM at paras. 16-17.

[13] Des Moines must also comply with accessibility requirements for certain public places, such as sidewalks, in accordance with the City's ADA Transition Plan as agreed upon with the U.S. Department of Justice.

placed on traffic signals or other poles within City sidewalks at between three to four feet (3'-4') above ground level. In certain areas, the wireless provider's request to place the cabinets in the proposed size and location on the poles was anticipated to result in the sidewalk becoming narrower and thus non-compliant with ADA and inaccessible for wheelchair users. In addition, the requested suspension of such cabinets at 3' to 4' above ground level raised accessibility concerns for the visually impaired who need to use canes for walking purposes, as the proposed height of the cabinets would likely make the cabinets undetectable by a cane while obstructing the sidewalk.

- Equipment installation on traffic signals or other poles within City right-of-way and sidewalks, as proposed, may violate clear-zone and traffic safety requirements as regulated locally, state-wide, and federally. If the above-described cabinet was placed on certain poles, it would overhang into the street or would conflict with traffic visibility. The City needs the ability to deny or regulate placement of the equipment on the poles to avoid traffic conflicts.

II. Regulatory Compliance. The language of Section 6409(a)(3) of the Spectrum Act, that "'nothing in paragraph (a) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969'"[15], implies that compliance with said Acts continues to be required of wireless technology and small cell deployment. Des Moines, as well as most other public and private entities, is required to comply with environmental and historical preservation review regulations as discussed by the Commission when federal funding or federal permitting are involved. For example, federal environmental and historical preservation reviews are typically required for the City to construct sanitary sewers, roadways, police or fire stations, and most other municipal infrastructure improvements, to provide necessary utilities and services to Des Moines' residents. While admittedly more varied in scope, the services provided by these regulated local improvements are no less important, and are often more valuable and needed by citizens, than the benefits of receiving faster internet service and not dropping cell phone calls which are provided by small cell technology. Thus from a utility analysis, it appears that the proposal addressed by the Commission would continue to require regulatory compliance by municipalities, at the cost of their residents, for services that are more essential than those provided by the deployment of new wireless technology. In addition, Des Moines has been required to protect or design around properties and structures determined to be historic based on the historic preservation review when providing essential services and utilities to its residents.

A. Historical Preservation Review and Historic Districts. In response to the Commission's question whether there are "circumstances, such as placement of facilities in historic districts or collocations near or on historic buildings, where there is a potential for significant effects on historic properties"[16], the City's answer is not only yes but moreover that certain neighborhoods and districts in the Des Moines area pride themselves on the historic nature of their homes and businesses, and lobby City staff and elected officials to ensure that their unique character is not affected. For Des Moines, this means the enactment of ordinances and policies designed to maintain the historical integrity of the designated historic districts, and the support of such ordinances and policies by City representatives in order to reflect the interests of the districts. Furthermore, the residents and owners in the historic districts request that utility providers be required by the City to comply with local ordinances and to avoid placement of non-compliant equipment within City right-of-way or on private property. The adoption by the Commission of a universal method in relation to small cell technology that could be placed upon any "structure"[17] in historic districts, such as a categorical exemption or determination that no "undertaking"

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[15] NPRM at para. 92.

[16] NPRM at para. 59.

[17] Specifically if the Commission adopts a broad definition of "structure" to include new poles or utility poles, road signs, etc., as suggested at NPRM paras. 39-45.

exists[18], would have the opposite effect of what the districts' residents, workers, and taxpayers intend. By implementing such an analysis, the Commission would be requiring the City to act contrary to the direction of its citizens if required to approve any "eligible facilities request" in a historic district that required no or limited historic preservation review. If any limitation on historical review is to be adopted by the Commission, Des Moines recommends that the new rules exclude review of specific structures (e.g. utility poles) based on the limited type of structure, and based upon the exact type of small cell technology to be placed thereon (for instance, antennas of a limited size rather than cabinets or mounted equipment), rather than a blanket exclusion based on the age of the structure.[19]

III. Interpreted Definitions of Section 6409(a) of the Spectrum Act.

A. Definitions of "Wireless", "Tower", and "Base Station". Des Moines recommends against any finding by the Commission that a "wireless" tower or base station include any a broad definition of "public safety towers". [20] No public safety provider, including municipalities, should be unconditionally required to "not deny, and...approve" a request for a modification of a public safety "tower" without any regard to the impact that such a request would have on the operation, maintenance, cost, or reliability of the public safety system other than that such modification "does not substantially change the physical dimensions of such tower or base station."[21] The same applies to a public safety, or any other municipal, "tower that is not yet used for any service".[22] The entity responsible for providing the public safety, or other, service associated with such a tower is the appropriate party, as owner thereof and as charged with protecting or providing services to the public, to make decisions regarding whether collocation is appropriate or would undermine or impair the system or services. A blanket requirement that collocation be allowed upon such structures would not be in the interest of the public relying on the safety or other services, or of the municipality or public entity charged with maintaining the tower and providing the services. This is specifically true if the Commission adopts a broad definition of "transmission equipment"[23], resulting in the non-negotiable addition of any size or form of "equipment" to be attached to public safety or other publicly-owned structures. In sum, Des Moines supports the definitions of "tower" as set forth in the Collocation Agreement[24] and the Nationwide Programmatic Agreement[25] as, respectively, "'any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities'" and "'[a]ny structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas....'" [26]

It is extremely overreaching for "structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support"[27], to be considered "wireless towers or base stations" such that a State or local government "may not deny, and shall approve"[28] modifications thereto. As discussed above, such interpretation could require that a City-owned facility such as City Hall or a traffic signal,

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[18] NPRM at para. 55.

[19] NPRM at para. 60 (citing the Collocation Agreement requirement that "existing buildings or other non-tower structures that are over 45 years old are not excluded" from Section 106 review, and PCIA response that "the percentage of utility poles that are 45 years or older is significant and growing.")

[20] NPRM at para. 104.

[21] NPRM at para. 92, quoting Spectrum Act § 6409(a)(1).

[22] NPRM at para. 104.

[23] NPRM at para. 105.

[24] Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, App. B.

[25] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1, App. C.

[26] NPRM at para. 107 (quoting Collocation Agreement, 47 C.F.R. Part 1, App. B, § I.B. and Nationwide Programmatic Agreement (Section 106), App. C § II.A.14).

[27] NPRM at para. 108.

[28] Spectrum Act, § 6409(a).

which currently accommodates – or moreover, may accommodate – a small cell antenna, be treated as a "base station" requiring mandatory approval of collocation or modification requests. In contrast, Des Moines supports the IAC's recommendation that "base station" should be interpreted to solely mean "'a set of equipment components that collectively provides a system for transmission and reception of personal wireless services'"[29]. Such an interpretation preserves a wireless provider's ability to ensure that it will be able to modify its own equipment as needed to deploy new technology, while respecting the proprietary right, first-hand knowledge, and experience of localities such as Des Moines to make decisions regarding the safety of residents and the use of City-owned structures.

B. Definition of "Existing". The Commission has asked how the word "existing" should be interpreted as used in the Spectrum Act.[30] First, Des Moines notes that the Spectrum Act refers to "existing wireless towers or base stations."[31] The defining term of "wireless" is clearly stated in the Act, and only by ignoring this term can one arrive at the interpretation of "existing" that "modifications of base stations 'encompass collocations on buildings and other structures, even if those structures do not currently house wireless communications equipment.'"[32] Similarly to the suggested broad definitions of "wireless" and "towers or base stations", this proposed interpretation of "existing" towers or base stations implies that a State or local government cannot deny collocation or modification to any structure, and the City reiterates its concern that a broad interpretation of "existing wireless tower or base station" would result in local governments being forced to approve such collocations or modifications regardless of any determination by the locality that the collocations or modifications would have a negative impact on the City's own facilities, structures and services and on the City's ability to fulfill governmental obligations to residents. Such an all-encompassing definition of "existing wireless tower or base station" makes sense only without a mandatory requirement that all "eligible facilities requests" be approved, regardless to any factor other than physical size, as is required by Congress in the Spectrum Act. The most consistent interpretation to facilitate wireless deployments, while minimizing conflict with local land use policies and preserving State and local government proprietary interest and control over their own property, is to limit "existing wireless towers or base stations" to the straightforward definition thereof – namely, as stated above, "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities" which "'currently' supports or houses base station equipment."[33] The economic benefit to the City of adopting a limited interpretation of "existing wireless towers or base stations" is to avoid losing the right to redevelop, demolish, or otherwise use City property as necessary for the City to support its residents and spur economic development; the ability to provide services and safety measures to the public without delays, interruptions or breaches; and to avoid the need to reconfigure or reconstruct the City's own facilities to accommodate unrequested wireless equipment in the event that such collocations or modifications impair the functionality or integrity of the City facilities (i.e., water or wastewater services or traffic signals).[34]

C. Definition of "Eligible Facilities Requests." In regard to the Commission's request for comment on "whether and to what extent a request to replace or harden a tower or other covered structure should be considered a covered request"[35], the City recommends again that a limited interpretation of "existing wireless tower or base station" is necessary in order for such a request to be a

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[29] NPRM at para. 109, quoting IAC Recommendation at 3.
[30] NPRM at para. 111.
[31] Spectrum Act, § 6409(a).
[32] NPRM at para. 111 (quoting Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 11-59, at 2 (filed Feb. 28, 2013)).
[33] NPRM at para. 107 (Collocation Agreement), and at para. 111 (quoting Section 6409(a) PN, 28 FCC Rcd at 3 (Wireless Bureau)).
[34] NPRM at para. 112, and at para. 115 (regarding upgrading "from 3G to heavier 4G facilities").
[35] NPRM at para. 115.

"covered request". For instance, the City is not in favor of an unconditional statutory requirement to allow a wireless provider to collocate on a traffic signal or road sign for an upgrade from 3G to 4G facilities, if such collocation would require replacement of such signal or sign. The City specifically would not want a wireless provider to be constructing or installing traffic signals, or at least not without extensive coordination with and direction from the City and its Traffic and Transportation Division and compliance with Department of Transportation and Manual on Uniform Traffic Control Device (FHWA) requirements. It is assumed that a wireless provider also does not have the desire or expertise to replace a City-owned traffic signal or any other utility-based structure which would need updating and/or reinforcing to accommodate an "eligible facilities request". For this reason also, the Spectrum Act should be interpreted narrowly to allow local governments to retain autonomy and control over City-owned structures and facilities and to disallow automatic wireless collocation or modification thereof.

D. Definition of "Substantially Change". In the event that the Commission's four-prong test to "determine whether a collocation will effect a 'substantial increase in the size of a tower'"[36] is used to "define when a modification would 'substantially change the physical dimensions' of a wireless tower or base station"[37], the Commission's implementation of such test should rely on the expertise of local authorities, and should explicitly disallow repetitive increases of ten percent (10%) in size. The Commission recognizes that "it is theoretically possible that successive increases of 10 percent could cumulatively increase the height of a structure by double or more."[38] If an "existing wireless tower or base station" is broadly interpreted to include any structure, whether or not it was constructed to provide wireless services[39], the mandatory approval of consecutive "eligible facilities requests" could result in light or utility poles or traffic signals that have doubled in height, or additions to City-owned or private buildings that compromise the safety and construction of the original structures themselves. As stated before, a generic application of a ten percent (10%) or other test is not applicable or realistic if a broad interpretation of "existing wireless tower or base station" is adopted. The City supports the IAC's argument that "'[t]he question of substantiality...cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions.'"[40] Moreover, Des Moines should have the right to preclude facilities requests on existing structures that are not specifically identified "existing wireless towers or base stations" when such requests would compromise the City's plans, provision of services, or the construction of the structure itself.

IV. Implementation of Section 6409(a) of the Spectrum Act.

A. "Special Circumstances". In response to the Commission's request for comment "on whether there are any special circumstances under which, notwithstanding [the statutory language "may not deny and shall approve"], Section 6409(a) would permit a State or local government to deny an otherwise covered request"[41], Des Moines asserts in part that a strict interpretation of the Spectrum Act, based on the statutory language itself, allows for such denial and thus "special circumstances" are not needed. For instance, if the Act is read on its face, then "covered requests" only include requests relating

[36] NPRM at para. 117 (quoting the Collocation Agreement, § I.C.)
[37] NPRM at para. 116.
[38] NPRM at para. 120 (citing The National League of Cities, The National Association of Counties, The United States Conference of Mayors, The International Municipal Lawyers Assocation, The National Association of Telecommunications Officers and Advisors, The Government Finance Officers Association, The American Public Works Association, and The International City/County Management Association ("National League of Cities et al.") Comments, WC Docket No. 11-59, at 46-47.)
[39] NPRM at para. 111 (Verizon proposal).
[40] NPRM at para. 122 (quoting IAC Recommendation at 2).
[41] NPRM at para. 124.

to towers or base stations that are in existence at the time of enactment of the Act, and structures that were constructed for the purpose of providing wireless services. There is no indication in the language of the Act that collocation or modification of any structure[42], rather than specifically wireless towers or base stations, can require mandatory approval by a city or State. "Eligible facilities requests" (or "covered requests" as used by the Commission) are also specifically defined by the Act itself.[43] Thus based on the language of the Act, Des Moines is required to approve any request by a wireless provider to collocate on or modify an existing wireless tower in the City, which is zoned appropriately and approved by the respective City commissions and officials in accordance with local ordinance and policy and was constructed for the purpose of providing wireless service, insofar as such request does not substantially change such structure as determined by the City's staff or representatives. Des Moines is not required to unequivocally approve collocation or modification of City Hall, or a traffic signal, or the wastewater treatment facility, or a historic property, by the language of the Spectrum Act. In sum, but for the request or desire that the Commission interpret the Act, the Spectrum Act is clear on its face that it is applicable only in specific circumstances ("eligible facilities requests") and only as to specific structures ("existing wireless towers or base stations"). The need for "special circumstances" arises only due to the broad interpretations being promoted by wireless providers and their organizations.

B. Local Codes and Regulations. The City also finds it imperative that the Commission allow local governments to utilize local building codes and land use regulations when reviewing and approving "eligible facilities requests", under either a narrow or broad interpretation of the Spectrum Act. Similarly to historic district requirements as described above, zoning regulations provide assurance to the citizens and business owners of the planned and allowed use of their properties. For example, the City of Des Moines includes a "CDO Capitol Dominance Overlay District"[44], which restricts the height of structures within the view of the State Capitol. This zoning regulation benefits the State of Iowa in preserving the Capitol building and grounds as well as the City, and has helped economic development of a distressed area around the State Capitol that has been redeveloped in accordance with the ordinance. Successive modifications of ten percent of an original structure in such District, specifically if an "existing wireless tower or base station" is interpreted to mean any structure, could undermine the nature of the District and would be contrary to the intent of the residents, owners, and redevelopers of the District, as well as of the City's zoning code. Examples such as these indicate the need for local governments to retain the right to regulate modifications to wireless towers and base stations in a manner consistent with the safety and land use regulations of their respective localities.

C. "Deemed Granted" Remedy. The City further supports the Commission's proposal to find that Section 6409(a) allows local governments to require the filing of an application for an "eligible facilities request", and allows cities to determine whether such request is in fact a "covered request" prior to approval.[45] However, Des Moines argues against the proposal that any request should be "'deemed granted' by operation of law if a State or local government fails to act within a specified period of time."[46] From a practical perspective, Des Moines is currently working with a wireless provider on deployment of small cell technology and has been doing so for the past six months or more. The provider itself has changed proposed locations and technology various times over the course of these months, in response to City questions and concerns. Neither the City nor the provider would have received any benefit from a 90-day or other specified time limit or "shot clock", and the additional time has allowed for a mutually-beneficially solution for both parties. In the NPRM, the Commission suggests that States or local

[42] NPRM at para. 111 (Verizon proposal).
[43] NPRM at para 92 (quoting Spectum Act § 6409(a)(2)).
[44] Des Moines Municipal Code, §§ 134-1245 et seq.
[45] NPRM at para. 131.
[46] NPRM at para. 137.

governments may "impermissibly den[y] a covered request" thus justifying a "deemed granted" remedy[47], but does not address the potential for wireless providers to fail to comply with the requirements of the Spectrum Act, and interpretations thereof, when making "eligible facilities requests" and modifying "existing wireless towers and base stations". Given the variety of interpretations of the Spectrum Act alone, it would be inappropriate to "deem granted" a request that may not be a covered request or may not be a request to modify what is defined by the Commission as an existing wireless tower or base station, simply because the City has – appropriately – rejected such a request or delayed its response because of negotiations with the wireless provider to make changes to the proposed application that would cause it to comply with the Act. A "deemed granted" rule is also problematic in the event that the City were to deny a request because of its proprietary or public safety interest rather than due to a land use or regulatory interest; such a rule would negate the City's proprietary right to deny any request in City-owned property. Des Moines agrees with the recommendation that "the onus be placed on the applicant to go to [a local] court or [a local representative of] the Commission and ask for a finding that an application is a covered request before it can be deemed granted"[48] if denied by a State or locality. The City is unaware of any "of the benefits of having a 'deemed granted' remedy"[49], including to the wireless provider applicants, other than possibly delaying profitability to such providers.[50] As stated above, Des Moines' own experience with small cell deployment is contrary to the assumption that a time limitation or "deemed granted" remedy substantially benefits either the local government or the wireless provider.

Conclusion. When making decisions regarding wireless communication and technological advances, it may be common and easy to associate primarily with the goal of providing new technology in the quickest manner possible. However, this goal needs to be balanced with the present needs and realities of Americans, including the local governments that provide their most immediate services and needs and respond to their requests on an everyday basis. Any interpretation or rulemaking that would compromise the abilities of municipalities to best provide safety and utility services to their residents, or to regulate and maintain city-owned structures and improvements that are funded by residents for their benefit, or to promote local historic districts and economic development, solely to expedite the deployment of new technology, should be avoided by the Commission.

Respectfully Submitted
By and on Behalf of the
CITY OF DES MOINES, IOWA

Jeb E. Brewer, City Engineer

[47] NPRM at para. 140.
[48] NPRM at para. 141.
[49] Id.
[50] Insofar as a covered request is "impermissibly denied" by a State or local government, it should be approved and the denial reversed by a court or the Commission and thus the only apparent damage to the wireless provider (applicant) is delay.